Public Hearing Transcript - Yakima, 6 p.m.

Please note, the opening comments at each hearing were read from a script and therefore are essentially the same at every hearing

IN THE STATE OF WASHINGTON
COUNTY OF YAKIMA

DEPARTMENT OF LABOR AND INDUSTRIES
PUBLIC HEARING - ERGONOMICS

Thursday, January 13, 2000
7:00 p.m.
Cavanaugh's at Yakima Center
607 East Yakima Avenue
Yakima, Washington

REPORTED BY:
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HEARING OFFICERS:
MR. TRACY SPENCER
MR. MICHAEL WOOD

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Department of Labor and Industries
Public Hearing - Ergonomics
January 13, 2000

TESTIMONY

MR. SPENCER: Good evening, ladies and gentlemen. I now call this hearing to order. This is a public hearing being sponsored by the Department of Labor and Industries. I am Tracy Spencer, Standards Manager, and this is Michael Wood, Senior Program Manager WISHA Services, and we are here representing Gary Moore, the Director of the Department of Labor and Industries.

For the record, this hearing is being held on January 13th in Yakima, Washington, beginning at 7:00 p.m. as authorized by the Washington Industrial Safety and Health Act and the Administrative Procedure Act.

If you've not already done so, please fill out the sign-in sheet located at the back of the room. This sheet will used to call forward individuals for testimony and to ensure that the hearing participants are notified of the hearing results.

For those of you who have written comments that you'd like to submit, please give them to Josh Swanson or Jenny Hayes at the back table. We will accept written comments until 5:00 p.m. on February 14th, 2000, for those of you unable to provide them tonight. Comments may be mailed to the Department of Labor and Industries' WISHA Services Division at P.O. Box 44620, Olympia, Washington, or e-mailed to ergorule@lni.wa.gov or faxed to 360-902-5529. Comments submitted by fax must be ten pages or less.

The addresses and phone numbers that I just gave you are located in the handouts that you were provided as you came in.

The court reporter for this hearing is Louise Bell of Central Reporting. Transcripts of the proceedings should be requested and are available from the court reporter. Also copies of the transcripts will be available on the WISHA home page in approximately three weeks.

Notice of this hearing was published in the Washington State Register on December 1st, 1999, and December 15th, 1999. Hearing notices were also sent to interested parties. In accordance with the RCW, notice was also published 30 or more days prior to this hearing in the following newspapers: the Journal of Commerce, the Spokesman Review, the Olympian, the Bellingham Herald, the Columbian, the Yakima-Herald Republic, and the Tacoma News Tribune.

The hearing is being held to receive oral and written testimony on the proposed rules. Any comments received today, as well as written comments received, will be presented to the Director.

Prior to starting the formal hearing, an oral summary of the proposed rules was given and a question and answer period occurred. Please refer to the handout provided to you at the door for a copy of the proposed rule.

In order to evaluate the potential economic impact of the proposed rule on small business, the Department completed a Small Business Economic Impact Statement in accordance with the Regulatory Fairness Act.

For those of you who have given oral testimony at a previous hearing, you will be called upon after all new testimony has been given, provided time permits. Please remember that this is not an adversarial hearing. There will be no cross-examination of the speakers; however, the hearing officers may ask clarifying questions.

In fairness to all parties, I ask your cooperation by not applauding or verbally expressing your reaction to testimony being presented.

If we observe these few rules, everyone will have the opportunity to present their testimony and help the Director to consider all viewpoints in making a final decision.

At this time we will take oral testimony. Please identify yourself, spell your name, and identify who you represent for the record.
John F. Tull?

MR. JOHN F. TULL: My name is John Tull, J-o-h-n T-u-l-l.
First of all, I'd like to take this opportunity to thank you guys for coming to Yakima and would like to address the Ergonomics Standard that has been proposed by the State of Washington Department of Labor and Industries.

I feel this proposed rule as written will not be in the best interests of the employers or employees of the State of Washington.

There have been two other states that have enacted ergonomics rules prior to this proposed rule: California and North Carolina. Both these states' rules are in question at this time. The California rule is now tied up in legal issues, and it's my understanding that the North Carolina rule is now tied up in a supervisory committee and it does not appear that it will be enacted.

The proposed Washington State rule states that a caution zone job can be determined quickly by employers. This is not the case. Since the caution zone is based upon numbers such as time or number of lifts, a prudent person would realize that to determine a caution zone job, he or she will have to observe a job or task until one of two things occur: Either the employee has entered a caution zone or is coming under the work period.

We also must consider that size of employees may have a definite impact on assessments. If you have two persons, one five foot three inches tall, one over six feet tall, doing the same job description, there's a possibility that two assessments would have to be done.

As we know, we say that, Well, we don't have to go overboard on our assessment, but the, the difference in enforcement by inspectors in the state vary from area to area. Where some inspectors have an objective approach, may take a lot more serious approach to one than some others. So the employers to cover themselves may have to go overboard on their assessments to make sure that they are going to come under that objective approach.

When we evaluate this rule, we got to keep one thing in mind: Does does it work? Does this, this prevention-based rule or does this prevention-based approach work? I've talked to several people from the Department of Labor and Industries who stated that the Department is trying to handle ergonomic injuries at this time within the Department, that they've got a program in place. It's not this standard, but that they have a program in place and have been addressing ergonomic injuries within the Department for quite some time.

I called the other day and was curious as to what is the experience factor within the State of Washington and within the Department and was told that the current experience factor for the Department of Labor and Industries was 1.33.
To put that in perspective, my clients as a whole have an average experience factor of .93, and they're in construction industry, what is considered to be a highly hazardous industry.

And when you're looking at a .93 average compared to a 1.33 -- and their rates or their incidence of ergonomic injuries has been lowering every year. Out of 12 clients, there were two injuries last year that, that would be considered an ergonomic injury. Two of them, in excess of 400 employees, you know, that were involved in these twelve companies.

When you look at that and you look at the number that the Department has for ergonomic injuries and look at what their experience factor is after they've been practicing ergonomic programs for the last few years, the question would be: Do these really work? That's a question that we'd all have.

I think that the Department should have the burden of proof to us first and show us that yes, this does work. The burden should not be on the employers within the state to prove, and we shouldn't be an experimentation for the Department.

The State of Washington, the Department of Labor and Industries should put this in practice in place, this proposed rule within themselves without increasing their budget to try to cover, you know, whatever costs would be involved in that. Do that for a period of five years and then we'll come back and see, does it really work? Show us that it works before you end up imposing it on us.

Thank you.

MR. SPENCER: Thank you.
Joe Walkenhawer?
Richard Sloop?

DR. RICHARD SLOOP: Well, good evening. I'm Richard Sloop. That's S-l-o-o-p. I'm a physician here in Yakima, a board certified neurologist. My background is seven years in academics at Loma Linda University School of Medicine as an associate professor of neurology. I've been here in Yakima in private practice for two and a half years.

In the last nearly ten years I've seen these kind of complaints, these kind of, quotes, injuries in academic, private practice and Worker's Compensation settings.
Let's start with definitions. A big problem here is the definition. What is an MSD, a musculoskeletal disorder? To boil it down, it is pain in various parts of the body which has not been produced by trauma, okay?

There are two types of MSDs, if you will. The first type is that which is symptoms of

pain associated with objective, verifiable cause. This would include things like carpal tunnel syndrome and disk herniation, producing nerve root compression.

These are associated with well-defined, localizable symptoms, abnormal nerve conduction studies, abnormal needle examination of the muscles, abnormal MRI, and abnormal examination.

The second group of MSDs, which undoubtedly is the largest group, is pain symptoms associated with no objective verifiable cause. The symptoms are purely subjective complaints. In the upper extremities these have been called cumulative trauma disorder, repetitive strain injury, repetitive motion disorder, tendinitis, tinosynovitis, et cetera.

In the low back, the Department chooses to call it at this time the low back disorder. Remember, these are by definition non-traumatic.

It's important to note that this second group, which is the majority of MSDs, is based solely on subjective complaints. No measurable, objective findings, a verifiable site of involvement; no pathologic findings, and an unpredictable course.

Also recognize that all of the studies in these particular diagnoses are normal: X-ray, MRI, needle examination of the muscle, nerve conduction study, measured muscle atrophy, tissue microscopic evaluation. All of these are normal.

So a better term for this second group would be chronic pain syndrome, okay? There's no consensus in medicine as to what causes these complaints or how to remedy them. Many of these symptoms of fatigue, stiffness, and transient pains are part of the normal, everyday life experience. And yet Michael and Barbara Silverstein want to make a rule to print these symptoms. It's remarkable how much they know and how little rest of us know.

The deceptive nature of the term "MSD" becomes evident when you realize that this encompasses a few objective, well-defined neurologic problems and a whole raft of chronic pain symptoms without any clearly defined pathology. These have been lumped together to create a smokescreen. The term is a useless one. It's not a diagnosis, and it should be abandoned.

Now that I've explained the junk science behind the term MSD, one has to ask, if we don't know what causes this second group of pain symptoms, how can we know they're work related?

Even with carpal tunnel syndrome, many have simply assumed that work is an important factor, but this has never been demonstrated in a scientific fashion, and there's much evidence to suggest that carpal tunnel syndrome is largely not work-related.

In the absence of specific and objective evidence of injury or illness, such as seen with carpal tunnel and nerve root compression from disk herniation, these pain symptoms likely represent normal physiologic responses to mechanical stress and should not be compensable work-related conditions.

Obviously the Department would like to expand its list of work-related illnesses, along with its budget. It would probably even include pregnancy as a work-related illness if it was allowed the chance.

There is simply no good scientific evidence that any of these conditions are work-related.

Okay, now let's talk about the rule. The purpose of the rule is to, quote, reduce employee exposure to hazards which can cause work-related MSDs.

Okay, the purpose of the rule is flawed from the beginning. The problem is none of these pain conditions have ever been objectively shown to be preventable by ergonomic changes. As a result, rather than addressing the important issue of whether this type of rule would reduce the cost of treating and paying the worker, we speak of reducing exposure to hazards.

A vague and ill-defined term which suits the Department because it sounds good, but it's short on specifics. This is junk science.

Let me illustrate. It's like trying to reduce the cost of automobile accidents. But rather than measure the actual cost of such accidents in money, injuries, and lives lost, the Department decides to identify hazards associated with automobile accidents.

One identified hazard is that cars with wheels that roll are associated with a higher incidence of accidents. Thus the Department forces manufacturers to produce cars with wheels that will not roll.

As a result, everyone begins buying trucks and driving them, but these are exempt from the rule. However, trucks are more difficult to drive, more dangerous, and so the accident rate actually goes up and more lives are lost.

Oh, yes, to be sure we did eliminate a hazard, but the real effect that we wanted to achieve -- less accidents, less lives lost -- was not realized. It looks good on paper, but in reality it's worse than useless.

The Department should be forced to demonstrate that these rules will result in a cost savings. This has never been done.

Michael Silverstein, when you were here a year ago, I challenged you to produce a single published study that showed that the incidence of these injuries goes down with ergonomic intervention. You've had a year to evidence this. What you've handed us today is a sorry collection of anecdotes and half-truths that proves nothing.

I was fortunate enough to have been provided this information several days before these hearings, so I've reviewed it. You cite 64 references; however, fully half of these citations are unreviewed reports; they're not published in any peer literature. This means that the authors of these reports have not subjected their ideas or findings to any scientific scrutiny.

You see, I can write a report on how I believe that apples cause lung cancer, but it's an entirely different thing to get that report published in a scientific journal after having undergone scientific scrutiny.

Of the remainder, none have conclusively linked an objectively confirmed diagnosis to objectively measure ergonomics hazard exposure, okay? Further, the Department fails to cite literature which does not support their conclusions. This would be laughable in any genuine scientific forum.

You've had one year, Mr. Silverstein. Is this all the better you can do? This is junk science. I would emphasize again that these rules have never been evaluated anywhere. They have never been shown in a pilot program to be efficacious in reducing these conditions in employees. What we have is completely and totally junk science.

In case any of you are unfamiliar with junk science, just think of Alar; then you'll understand what junk science is. This is what this department is trying to foist on us. The Department should be forced to prove the benefit of such a program, not on reducing some hazard but on actually reducing these pain conditions and the cost to treat and rehabilitate the employee.

This must be done in a pilot program. It must be done using well-defined, measurable conditions such as carpal tunnel syndrome, which can be electrically verified, and then show that by implementing these rules, the incidence of carpal tunnel and the expense involved has been reduced as a result.

This pilot program must be completed before this mass of junk science can be foisted on the unsuspecting workers and employers of this state. We cannot allow junk science to produce a knee jerk response.

I want to emphasize once more that all you've been told about repetitive motion causing carpal tunnel syndrome, tendinitis, and other injuries is junk science. It isn't so; it's never been shown to be so in any reasonable, reliable, controlled study. Another point that must be understood is that ergonomists have a vested interest here. This is about their jobs. This is about creating jobs for themselves. This is an industry arising to fill a need they have created. This is about their future. This is about Michael Silverstein's future, where Mr. Silverstein goes from here.

Will he have to get a real job and work for a living, or will he be able to go back to Washington, D.C. and foist this same kind of pseudoscience upon millions more? This is not about protecting workers, this is not about science. These people have a vested interest in junk science.

Further, employers are told under this rule that alternative methods to protect workers may be used only if they can prove that these alternative methods are as effective as the Department's rules in reducing the hazards, okay?

Of course, we've just told you that Department hasn't proven -- that the Department has not proven that their rule does anything. So there is no standard. How can the employers measure up when no standards exist?

The burden of proof should not rest on the employer but on the Department to prove the benefit of such measures and set a reproduceable standard. This can only be done with a pilot program.

Lastly, I want to speak to the farmer, especially the family farmer. I own 40 acres of orchard in the Lower Nachez. I have many friends in the farming business. Everyone here recognizes the plight the orchardists of this valley find themselves in. People are not recovering, farms are being foreclosed on.

I've spoken with a number of farmers in my neighborhood. These guys are struggling. If this rule is adopted, extinction is assured. You cannot pick apples or pears without running afoul of this rule. You cannot prune trees without being in a hazard zone. You can't thin fruit without being in a hazard zone.

Adoption of this rule will decimate my neighbors, my friends, and the economy of this valley, all because of junk science. All because of the selfish ambitions of the self-serving. All for something that has never been shown to work. This is unacceptable. This cannot be allowed to happen. This would be bad for my workers. It doesn't protect anyone. To quote Michael Silverstein himself, this is just plain wrong.

Thank you.

MR. SPENCER: Thank you.
Jeanna (sic) Guzman?

(The following testimony was translated into English by Ms. Sean Phelan.)

MS. ANNA MARIA GUZMAN: Good evening. To everyone who is here, my name is Anna Maria Guzman. My name is spelled Anna and then it's G-u-z-m-a-n.

First of all, I want to congratulate the personnel of the Department of Labor and Industries for adopting regulations that will protect workers in the apple industry. I feel very motivated to give my testimony as a worker in this industry and also as an injured worker, because I see that there's a possibility that maybe we will be treated with more quality like other workers in other industries.

I want to say that I have been a worker in this industry for more than 25 years. I have worked as a field worker and also in the packing houses. And I want to make my testimony as brief as possible.

As an injured worker I have had very sad experiences. I was injured in my hands in August of 1995. I have had a fight that's been very difficult and long. Sometimes it's been with Labor and Industries, but above all it's been with my supervisors in the packing houses and with the bosses.

Because they make it very difficult for us to exercise our rights as agricultural workers. Because when a worker knows a little bit about his rights or has some training about what his rights are, it's a little bit easier if you know your rights. But those who don't know anything, it's very difficult for them.

I can tell you that when I injured myself, it was between August of 1995 and February of 1996. I had to have almost a war to get medical attention for my injuries, and a lot of my fight I had to fight against the supervisors in my packing house.

Many times the doctors say that you're 100 percent fine and they send you back to work and close your case. In my case, the doctor closed my case and I was left with no protections of any kind. I had to fight very hard, and I almost had a confrontation

with the case manager of my case to explain to her the diagnostic tests, the diagnosis of the doctors who had examined me.

More than anyone, I blame the bosses. I don't have anything against them; it's just my testimony, which is the truth.

Then I had to look for the help of a lawyer, because I had to work for a very long time without medical attention and without any medication.

While this time was going by, I couldn't have my surgery until February of 1998. So all the time in between I didn't have any medical attention or any medication, including not even any pills. I didn't have any orders from my doctor saying that I could only do light duty.

But what hurt me the most, what bothers me the most is that I was treated like a disposable worker. Because the experience that I had and what I observed around me was that the machines that are inside the packing houses get more attention than the workers do, because they have mechanics right at the foot of the machines. And after I had my surgery, I had another examination after six months. Then I had another exam in October of 1999.

I don't want to take a long time with this testimony, because it can be long and because it's also a sad story. I consider myself to be a fortunate person because I've learned what my rights are and I have known how to confront the situations.
But I feel sad for my fellow workers who are afraid to report their injuries. Because the moment a worker is injured in his work, he undergoes a terrible pressure and a hostility to make them leave their jobs or else they get fired.

It's very sad, because workers in this industry have been productive workers. And this industry is a multibillionaire industry.

So I think if Labor and Industries is going to take these measures, I think it's fair and I think that we deserve it. We are first-class workers and I don't think any employer is going to go bankrupt to take measures to prevent workers from being injured and to give them a treatment that is human.

And I'd like to ask you, after adopting these measures that you're proposing, how are you going to ensure that these employers enforce the law, to make sure that they're complying and completing with the law as it's written?

I would like you to take into account during your enforcement everything that's going on. And I hope that workers will leave aside their fear, that they will give their testimony and that everything will become easier for the employers as well as for us; that employers will make us feel that we can continue to be useful if they respect our medical restrictions or orders, so that they will allow us to continue to be productive while we are recovering one hundred percent.

Thank you.

MR. SPENCER: Thank you.
Is there anyone else out there that would like to testify on the proposed rules? Come on up.

MS. CRISTEN KOHL: My name is Cristen Kohl, C-r-i-s-t-e-n K-o-h-l.
From the age of 12 to 22, when not in school I worked at my family's orchard or in fruit warehouses during the summer breaks. From the ages of 22 to 32 I worked for

three different Fortune 500 corporations in this valley involved in the banking and/or finance industry. I have seen both sides of the coin, as far as a lot of people are concerned, when it comes to skilled and non-skilled labor jobs. In the times that I worked for the Fortune 500 companies here in Yakima, I was in different levels of jobs, from entry-level clerical to sales to the highest level of local management. In those ten years I never once saw an L&I inspector come into our offices or have any knowledge or any exposure to any regulations of L&I over the workers in our offices.

Having done both types of jobs, I can tell you that the only difference between working in the agricultural industry and working for a corporation such as a bank or a financial institution is that one's wearing a suit and one is wearing jeans and a T-shirt, as far as the amount of physical strain and stress that goes on with the body. My concern with these rules is that it is another way of focusing on the agriculture industry, which has already been overtaxed and overburdened with rules and regulations that corporate America has not had to comply with.

And I don't think it is fair and I don't think it is right that the agriculture industry or other similar such industries are going to be once again burdened with another set of rules and regulations that are going to be costly and expensive, when there's a lot of other industries that do not even have the ability to call an attorney if you have been injured on the job.

For example, in banking and finance you can only go to an arbitration board which is made up of industry officials and retired industry officials.

So as far as the rights and treatment of workers, from looking at two different areas, I can say I've had better treatment in the agriculture industry than I had in the Fortune 500 industry.

Thank you.

MR. SPENCER: Thank you.
Again, is there anyone else who would like to testify on the proposed rules? Come on up.

MS. DARLENE HARDY: I'll make this short and sweet.
My name is Darlene Hardy, and that's D-a-r-l-e-n-e H-a-r-d-y, and I'm with Regulatory Consultants Incorporated. And what we are, we're a consulting organization that works with different companies, making sure they're in compliance with OSHA, WISHA, DOT, and EPA regulations.

The concerns I get from my clients is that this regulation is going to be so comprehensive that they're not going to be able to understand it and comply with it. I've looked intensively at the OSHA regulation as it's come down. I have not done so, so much, with the proposal that's in front of the Board right now in front of you. However, what I'm finding is that there seems to be wanting more direction, more explicit explanation of what is going on and what is expected of each of the employers as they are complying with this regulation. And if you can do more defining of exactly what is expected, I think it will assist all employers in relieving some of their fears of complying with this regulation.

Thank you.

MR. SPENCER: Thank you.
Okay, anyone else wish to testify at this point?

I want to thank you all for coming and thank those of you who testified. Again, I want to remind you that the deadline for sending in your written comments is 5:00 p.m. on February 14th, 2000.

This hearing is adjourned at 7:37 p.m.

C E R T I F I C A T E
STATE OF WASHINGTON)
) ss.
COUNTY OF YAKIMA)

This is to certify that I, Louise Raelene Bell, Certified Court Reporter and Notary Public in and for the State of Washington, residing at Yakima, reported the within and foregoing hearing; said hearing being taken before me as a Notary Public on the date herein set forth; that said examination was taken by me in shorthand and thereafter under my supervision transcribed, and that same is a full, true and correct record of the testimony of said witness, including all questions, answers and objections, if any, of counsel.

I further certify that I am not a relative or employee or attorney or counsel of any of the parties, nor am I financially interested in the outcome of the cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal this _____ day of _____, 2000.

_____

Notary Public in and for the State of Washington, residing at Yakima.
My commission expires May 28, 2003.
Venue: L&I hearing - ergonomics
Appearances:
Hiring attorney: Josh Swanson, Administrative Regulations Coordinator, 7273 Linderson Way, Tumwater, WA 98504
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